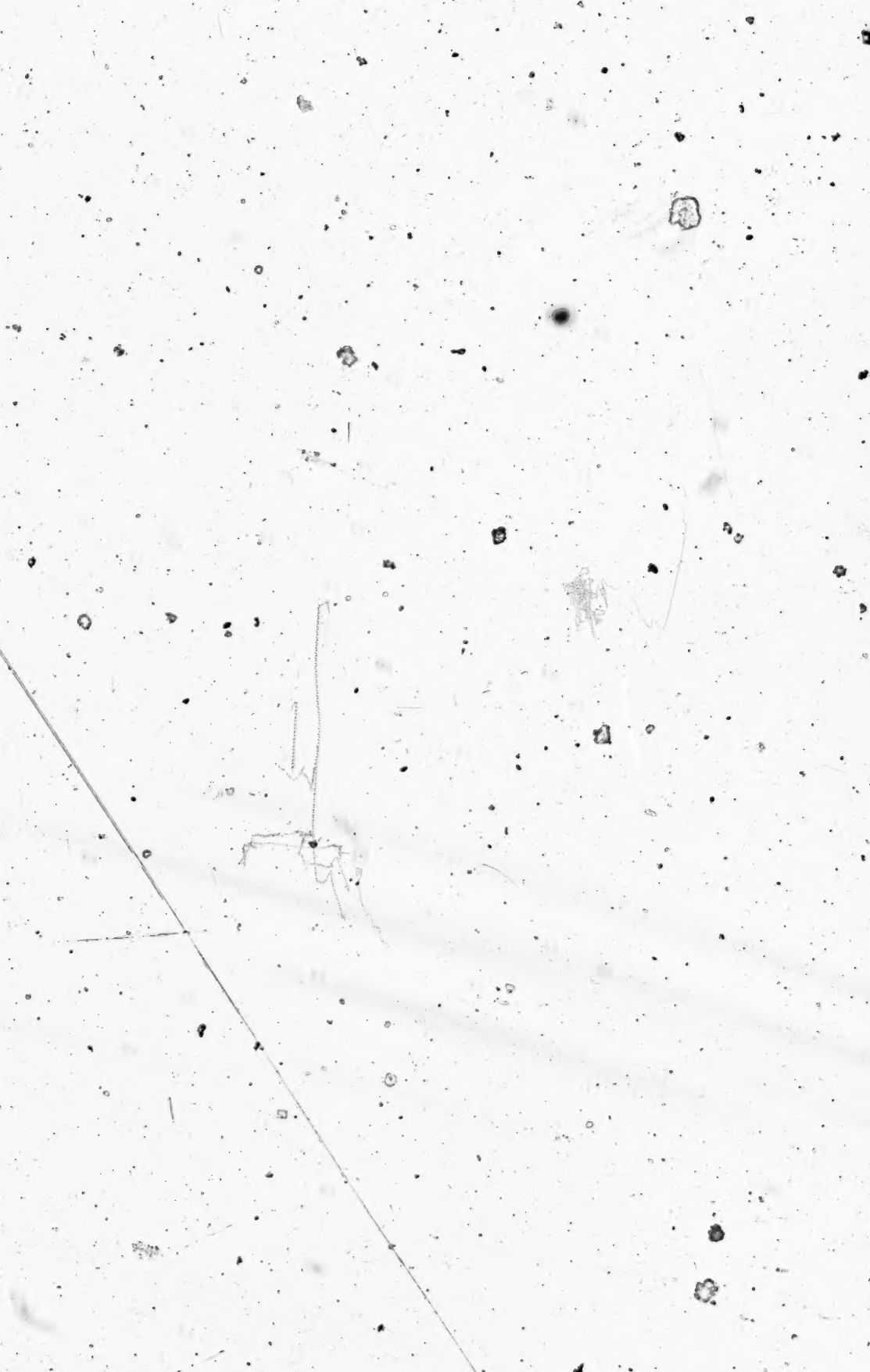

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No. 253

In the Supreme Court of the United States

OCTOBER TERM, 1939

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINION BELOW

The opinion of the circuit court of appeals (R. 44–48) is reported in 105 F. 2d 598. The "Decision and Direction of Election" (R. 28–36) issued by the Board on November 8, 1938, is reported in 9 N. L. R. B. 742, and the "Supplemental Decision and Second Direction of Election" (R. 14–18), issued by the Board on March 1, 1939, is reported in 11 N. L. R. B. 848.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 28, 1939 (R. 43). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether a direction of election issued by the National Labor Relations Board in a proceeding under Section 9 (c) of the National Labor Relations Act is reviewable by a circuit court of appeals under Section 10 (f) of the Act.

2. In an election in which the names of two competing labor organizations were placed on the ballot and a place was also provided for the employees to vote against representation by either organization, neither of the competing organizations obtained a majority of the votes cast, although one received a plurality. The Board directed a run-off election in which the name of the organization which received a plurality in the first election is to be placed on the ballot and that of the organization which received the smaller number of votes in the first election is to be omitted. If the answer to the first question is in the affirmative, there is presented the question whether this direction of election was an abuse of discretion.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (c. 372, 49 Stat. 449, 29 U. S. C. Supp.

IV, Section 151 *et seq.*), are set forth in the Appendix, *infra,* pp. 49–56.

STATEMENT

On February 2, 1938, the International Brotherhood of Electrical Workers, Local 876 (I. B. E. W.), one of the respondents here, filed with the Regional Director of the Board at Detroit, Michigan, a petition alleging that a question affecting commerce had arisen concerning the representation of employees of Consumers Power Company, Jackson, Michigan (hereinafter called the Company), and requesting an investigation and certification of representatives for collective bargaining pursuant to Section 9 (c) of the Act (R. 28).

Pursuant to its Rules and Regulations (Art. III, Sec. 3, Series 1, as amended), the Board, on August 12, 1938, authorized the Regional Director to conduct an investigation and to provide for an appropriate hearing upon notice (R. 28). Pursuant to notice, a hearing was held on August 29 and 30 at Detroit, Michigan, before a Trial Examiner (R. 29). The I. B. E. W., the Utility Workers Organizing Committee (U. W. O. C.), which also claimed to represent employees of the Company, and the Company were all represented by counsel and participated in the hearing (R. 29). On November 8, 1938, after opportunity for oral argument before the Board (R. 29), of which the parties did not avail themselves, the Board issued a

Decision and Direction of Election (R. 28–36). The Board found that a question affecting commerce had arisen concerning the representation of the Company's employees, and pursuant to the authorization contained in Section 9 (c) of the Act so to do, directed that as part of the investigation an election by secret ballot should be conducted under the direction and supervision of the Regional Director to determine whether the Company's employees, with certain exceptions not here relevant, desired to be represented by the I. B. E. W., by the U. W. O. C., or by neither (R. 36).

Thereafter, from January 10 to January 13, 1939, the Regional Director conducted such election by secret ballot, as required by the Board's Direction of Election and amendments (R. 37–41) thereto. On January 21, 1939, pursuant to the Board's Rules and Regulations (Art. III, Sec. 9, Series 1, as amended), the Regional Director served on the parties his Intermediate Report on the conduct of the ballot. No exceptions to the Intermediate Report were filed (R. 15). The Report showed the results of the secret ballot to be as follows (R. 3, 15):

Total Number of Employees Eligible	2,977
Total Number of Ballots Cast	2,806
Total Number of Votes for I. B. E. W.	1,072
Total Number of Votes for U. W. O. C.	1,164
Total Number of Votes for Neither	506
Total Number of Challenged Ballots	52
Total Number of Blank Ballots	1
Total Number of Void Ballots	11

Upon the expiration of the period for filing exceptions to the Intermediate Report, the Regional Director forwarded it to the Board. Thereafter, by letter, the chairman of the U. W. O. C. requested that the Board certify the U. W. O. C. as representative of the employees (R. 16). The Secretary of the Board replied that such certification would not be in accordance with the principle established by the Board that no representative be certified which has not received a majority of the votes cast in an election (R. 16). Counsel for the U. W. O. C. and the chairman thereof thereupon requested the Board to direct the holding of a run-off election providing for a choice for or against the U. W. O. C., which had received a plurality of the votes in the January election (R. 16). The Secretary of the Board, on February 8, 1939, notified the parties that the Board would direct the holding of a run-off election unless objection was received within five days (R. 16, 4).

On February 11, 1939, counsel for the I. B. E. W. informed the Board that it had no objection to the holding of a run-off election in which the I. B. E. W. would be included on the ballot, but that it did object to the holding of any run-off election in which that organization's name would not be included, and requested oral argument before the Board concerning its right to appear on the ballot (R. 16, 12–14). The latter request was granted and oral argument was had before the

Board on February 24, 1939, by counsel for the I. B. E. W. and counsel for the U. W. O. C. (R. 16, 6).

On March 1, 1939, the Board issued its Supplemental Decision and Second Direction of Election, now sought to be reviewed (R. 14–18). In this decision the Board stated (R. 16–17):

> In *Matter of Interlake Iron Corporation* and *Amalgamated Association of Iron, Steel, and Tin Workers of North America, Local No. 1657*, 4 N. L. R. B. 55, the Board, in reaffirming its policy of providing a space on the ballot, in elections involving two or more rival unions, in which a voter may indicate that he does not desire either of the named unions to represent him, stated that, "In the event that the election in the present case results in none of the three preferences obtaining a majority of the votes cast, we will, upon request of the labor organization receiving the greater number of votes, promptly direct a run-off election, in which the ballot will allow employees the opportunity to vote for or against this organization." This policy has since its formulation been consistently followed by the Board. We have considered the questions raised in the I. B. E. W. letter of February 11, 1939, and the considerations advanced by counsel for I. B. E. W. at the oral argument, and find no reason to depart from our established practice in cases of this kind.
>
> A majority of the employees of the Company in the appropriate unit have indicated

> a desire to bargain collectively with the Company, although they have accorded neither of the rival unions a majority. As noted above, U. W. O. C., which received the greater number of votes validly cast in the election, has requested the holding of a run-off election. The Board finds that the question concerning representation which has arisen can best be resolved by the holding of a run-off election in which the employees in the appropriate unit will be given the opportunity to decide whether or not they desire to be represented by U. W. O. C. We will so direct. * * *

The Board accordingly directed that a run-off election by secret ballot should be conducted within forty-five days, under the supervision of the Regional Director, to determine whether or not the employees desired to be represented by the U. W. O. C. (R. 17–18). On March 15, 1939, the Board directed that the run-off election be conducted on April 11, 12, 13, and 14, 1939 (R. 19, 21).

On April 5, 1939, the I. B. E. W. filed its petition in the court below to review and set aside the Board's Supplemental Decision and Second Direction of Election (R. 1–12). It also applied for a stay pending a determination of its petition for review (R. 21–23). On April 10, 1939, the Board filed its opposition to the application for a stay (R. 23–24) and a motion to dismiss the petition for review for lack of jurisdiction (R. 24–27). After oral argument, the court, on April 10, 1939,

granted the I. B. E. W.'s application for a stay of the election pending the hearing and determination of its petition for review (R. 42). On May 10, 1939, the case was heard by the court on the Board's motion to dismiss, but the merits of the case were also briefed and argued (R. 43, 48). On June 28, 1939, the court handed down its decision, in which it held that it had jurisdiction to review the Board's Supplemental Decision and Second Direction of Election and, on review thereof, held that the Board had acted unlawfully in excluding the I. B. E. W. from the run-off ballot (R. 44–48). The court ordered that the "order complained of be * * * set aside" (R. 48, 43). On October 9, 1939, this court granted a writ of certiorari.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that it had jurisdiction to review the Board's proceedings in this case.

2. In holding that the Board had acted unlawfully in directing that the name of respondent local be omitted from the ballot in the run-off election.

3. In setting aside the Board's Second Direction of Election.

SUMMARY OF ARGUMENT

I

The court below had no jurisdiction to review the Board's proceedings in this case. The author-

ity of the circuit courts of appeals to review orders of the Board is derived solely from Sections 9 (d) and 10 (e) and (f) of the Act. The court below held that it had jurisdiction under Section 10 (f), but this holding is contrary to the decisions of numerous other courts and to the plain meaning of the Act. Examination of the provisions of Sections 9 and 10 shows that Section 9 (d) was intended to preclude the courts from reviewing representation investigations under Section 9 except in connection with their review of orders issued by the Board in unfair labor practice cases under Section 10 where such orders are based upon facts certified by the Board in representation investigations under Section 9, and that Section 10 (f) provides for review only of final orders made in unfair labor practice cases under Section 10.

1. That Section 10 (f) applies only to the review of orders entered in unfair labor practice cases under Section 10 appears clearly from its position as an integral part of Section 10 and from various of its express terms. These plainly show that Section 10 (f) was not intended to provide review of a case like the present, which presents no unfair labor practice, no pleadings, and no order.

2. Moreover, Section 10 (f) unequivocally requires that there be a "final order" as a prerequisite to judicial review. The Board's direction of election is not a final order. *Cupples Company Manufacturers* v. *National Labor Relations Board,*

103 F. 2d 953, 955 (C. C. A. 8th). Cf. *United Employees Association* v. *National Labor Relations Board*, 96 F. 2d 875 (C. C. A. 3d); *American Federation of Labor* v. *National Labor Relations Board*, 103 F. 2d 933 (App. D. C.), No. 70, this Term, pending argument herewith. We think that it is not an order at all. But even if it is regarded as an order, it is plainly interlocutory. Thus the holding of the court below that it had jurisdiction is contrary not only to the terms of Section 10 (f), but also to the "traditional conceptions of federal judicial power." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383–385.

3. Section 9 (d) of the Act was affirmatively intended by Congress to preclude a review of a direction of election, or any other action by the Board in a representation investigation under Section 9, except in the single situation where an order of the Board in an unfair labor practice case under Section 10 is based upon facts certified in a representation proceeding and enforcement or review of the order is sought pursuant to Section 10 (e) or (f). This interpretation of Section 9 (d) is shown to be correct by the legislative history. S. Rept. No. 573, 74th Cong., 1st Sess., p. 15; H. Rept. No. 1147, 74th Cong., 1st Sess., p. 23; 79 Cong. Rec. 7658. The reports of the committees recommending the passage of the National Labor Relations Act show that

Congress was especially anxious to prevent delays in election proceedings such as had been occasioned by resort to the courts permitted under Public Resolution 44 (approved June 19, 1934, c. 677, 48 Stat. 1183), which, with Section 7 (a) of the National Industrial Recovery Act (Act of June 16, 1933, c. 90, 48 Stat. 195, 15 U. S. C., Sec. 701, *et seq.*), was the legislative predecessor of the National Labor Relations Act. H. Rept. 1147, 74th Cong., 1st Sess., pp. 6–7; S. Rept. 573, 74th Cong., 1st Sess., pp. 5–6.

4. The foregoing interpretations of Sections 10 (f) and 9 (d) raise no substantial question of constitutionality. There can be no question as to the validity of Section 10 (f), since Congress clearly was not required to invest the circuit courts of appeals with jurisdiction. *Shannahan v. United States*, 303 U. S. 596; *In re National Labor Relations Board*, 304 U. S. 486, 495. In regard to Section 9 (d), construed to be exclusive, any claim of unconstitutionality under the due process clause is answered by the fact that the Act grants no right to an election and that the Board's direction of election has no legal effect upon any right of self-organization or collective bargaining. Even if rights of respondents were assumed to be affected by the Board's direction of election, there would be no constitutional necessity for a review of it, since it is merely an interlocutory step in proceedings not yet completed before the Board. *Rochester Tel. Corp.* v.

United States, 307 U. S. 125; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Moreover, generally speaking, the Constitution does not require that even the final action of an administrative body be reviewable. See cases collected in the concurring opinion in *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38, 77–81, and in *Rochester Tel. Corp.* v. *United States*, *supra*.

II

Even assuming that the court below had jurisdiction, it erred in setting aside the Board's direction of the run-off election. The Board did not abuse its discretion under Section 9 (c) in directing that the ballots to be used should omit the name I. B. E. W. and should permit only votes for or against the U. W. O. C. The Board's direction was in accordance with its well-settled practice and was designed to afford the employees full opportunity freely to make known their desires.

The decision of the court below that the form of ballot utilized by the Board is illegal and unfair was based upon the misapprehension that the purpose of an election is "to select, not to reject, representatives" (R. 46; 165 F. 2d, at 600). The purpose of an election, pursuant to Section 9 (c), is to enable the Board to ascertain whether there is a collective-bargaining representative of a majority of the employees. The form of ballot advo-

cated by the respondents and apparently required by the court below—i. e., a ballot containing the names of both unions, and with no place for a "neither" vote—would inevitably result (barring a tie vote) in one or the other of the two organizations on the ballot winning the election and, presumably, being certified. But since the employees not desiring to be represented by either union would have no opportunity to so indicate in an election so conducted, the results of the election would not necessarily prove that the winning union was in fact the freely chosen representative of a majority of the employees.

The form of ballot utilized by the Board precludes any possibility of a certification of a union which in fact is not the freely chosen representative of a majority of the employees; any employee who does not wish to be represented by the union on the ballot may vote against it. At the same time the employees who voted for the union which did not receive a plurality of the votes in the first election are enabled to subordinate, if they so wish, their choice as between particular representatives to their desire for collective bargaining. Experience in other cases shows that this form of the ballot does not predetermine the result in favor of the union named on it, and appears fully to justify the Board's adherence in this case to its consistent practice.

ARGUMENT

I

THE COURT BELOW HAD NO JURISDICTION TO REVIEW THE DIRECTION OF ELECTION

The authority of the circuit courts of appeals to review orders of the Board rests wholly on Sections 9 (d) and 10 (e) and (f) of the Act. The court below held that it had jurisdiction to review the direction of election in this case under Section 10 (f). This decision is contrary to the prior holding of the same court in *Combustion Engineering Co.* v. *National Labor Relations Board*, 95 F. 2d 996, and to numerous decisions of other courts passing on the question. *Unlicensed Employees of Sabine Transportation Co.* v. *National Labor Relations Board*, decided November 12, 1937 (C. C. A. 5th) (reported in C. C. H., Labor Law Service, p. 16040); *Cupples Company Manufacturers* v. *National Labor Relations Board*, 103 F. 2d 953, 955 (C. C. A. 8th); *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board*, 97 F. 2d 1010 (C. C. A. 7th). See also *American Federation of Labor* v. *National Labor Relations Board*, 103 F. 2d 933 (App. D. C.), certiorari granted, October 9, 1939, No. 70, this Term; *Unite Employees Ass'n* v. *National Labor Relations Board*, 96 F. 2d 875 (C. C. A. 3d); *Wallach's, Inc.* v. *Boland*, 277

[1] In the *Combustion Engineering* and *Unlicensed Employees* cases the Board's motions to dismiss petitions for review of directions of elections for lack of jurisdiction were

N. Y. 345 (decided under the New York State Labor Relations Act).

A summary of the relevant provisions of Sections 9 and 10 will facilitate comprehension of the question. Section 9 deals with and is headed "REPRESENTATIVES AND ELECTIONS." Subsection (a) declares that representatives designated for collective bargaining designated by a majority of the employees in an appropriate unit shall be the exclusive representatives for collective bargaining of all the employees in the unit. Subsection (b) authorizes the Board to determine the appropriate unit. Subsection (c) provides that, when a question affecting commerce arises concerning the rep-

granted without opinion. The same result was reached by consent in the *New York Handkerchief* case, but the court's additional statement that the petition was dismissed "for the reason that said petition is premature" indicates that the court believed it was without jurisdiction.

In the *Cupples* case, which involved both a direction of election and an order against the employer in an unfair labor proceeding under Section 10, the court held that the scope of its inquiry must be limited to the latter. The decision in the *Cupples* case is in direct conflict on this point with *National Labor Relations Board* v. *Falk Corporation* (C. C. A. 7th), 106 F. 2d 454, now pending on petition for certiorari, No. 460, this Term.

In the *American Federation of Labor* and *United Employees* cases the courts held that they had no jurisdiction to review certifications issued by the Board. If a certification—the final step in a representation proceeding—is not reviewable, a direction of election, which is a preliminary direction of the Board to its own subordinate officials to take certain proceedings as part of the investigation concerning representation, is, *a fortiori*, not reviewable.

resentation of employees, the Board may investigate and certify the name of the representative designated, and may take a secret ballot of employees or utilize any other suitable method to ascertain the representative. Subsection (d) provides that when an order of the Board in an unfair practice case under Section 10 is based upon facts certified in a representation investigation under Section 9, and review of the Section 10 order is sought, the decree of the court enforcing, modifying, or setting aside the order shall be entered upon a transcript including the certification and the record of the representation investigation under Section 9. Section 9 thus deals with "Representatives and Elections" and provides for a review only where such proceedings are involved in a Section 10 case.

Section 10, on the other hand, deals solely with and is headed "PREVENTION OF UNFAIR LABOR PRACTICES." The provisions of this section form a coherent and distinct whole. Subsection (a) empowers the Board "as hereinafter provided, to prevent any person from engaging in any unfair labor practice [listed in section 8] affecting commerce." Subsection (b) provides that when any person is charged with engaging in any such unfair labor practice the Board may issue "a complaint stating the charges" and may hold a hearing, and that the person named in the complaint has the right to file an "answer." Subsection (c) directs the Board, if upon the testimony it is of the opinion that there

has been any unfair labor practice, to state its findings of fact, and to issue an "order" to cease and desist and to take appropriate affirmative action; if it is of the opinion that there has been no unfair labor practice, it is directed to issue an "order" dismissing the complaint. Nowhere else in the statute is the Board empowered to issue an "order"; the "order" referred to in Section 9 (d) is issued pursuant to Section 10 (c). Subsection (d) reserves to the Board authority to modify or set aside any finding or order until a transcript of the record shall have been filed in a court "as hereinafter provided."

Subsection (e) permits the Board to petition the circuit court of appeals in any circuit "wherein the unfair labor practice in question occurred or wherein such person resides or transacts business" for the enforcement of *"such order,"* the court to obtain jurisdiction upon the filing of a transcript of the complete record, "including *the pleadings* and testimony upon which *such order* was entered" and the *"order"* of the Board. The court is granted power to enter a decree enforcing, modifying, or setting aside *"the order"* of the Board. [Italics supplied.]

We come now to subsection (f), which provides:

> Any person aggrieved by a *final order* of the Board granting or denying in whole or in part the relief sought may obtain a review of *such order* in any circuit court of appeals of the United States in the circuit wherein

> the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the *order* of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the *pleading* and testimony upon which the *order* complained of was entered and the findings, and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the *order* of the Board; * * * [Italics supplied.]

The Government submits that the direction of election made under Section 9 in this case was not within the reviewing jurisdiction conferred upon the circuit courts of appeals by the Act. First, Section 10 (f), relied upon by the court below and by the respondent, contemplates review only of orders made under Section 10 in an unfair labor

practice proceeding, and here there was only a representation investigation under Section 9. Second, Section 10 (f) provides only for review of a "final order," and there was no final order here. Third, review of representation investigations is specifically covered by Section 9 (d), which provides that they shall be considered by the courts only in connection with review of orders issued by the Board under Section 10 in unfair labor practice cases where such orders are based, in whole or in part, upon facts certified by the Board in representation investigations. Fourth, the Government's interpretation of the Act raises no constitutional question.

1. The summary of Section 10 made above shows that Section 10 (f) extends only to the review of orders entered in proceedings brought to prevent unfair labor practices, and not to the review of investigation proceedings (except that review of an unfair labor practice order extends to the record in a representation investigation in the single situation specified in Section 9 (d)). Section 10 as a whole was designed to establish a procedure in accordance with which the Board might enter orders prohibiting unfair labor practices and pursuant to which the circuit courts of appeals, on petition of either the Board or an aggrieved party, might review such orders. It plainly was not intended to provide review of a case like the present, which involves no unfair labor practice, no plead-

ings, and no order. That appears from its title, from the language of each of the paragraphs preceding paragraph (f), from the position of paragraph (f) as an integral part of Section 10, and from its express terms, including the reference in it (as in paragraph (e)) to the circuit "wherein the unfair labor practice in question was alleged to have been engaged in."

Moreover, the jurisdiction of the circuit courts of appeals under Section 10 (f) is of the same scope as their jurisdiction under Section 10 (e). *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 369. Section 10 (f) grants no right of review of an order which the Board has no right to enforce under Section 10 (e). And the court below obviously could not have entertained a petition for the enforcement of the Board's direction of election, even assuming *arguendo* that it was a final order. The direction did not purport to require respondent, or anyone other than the Board's Regional Director, to take or refrain from taking any action.

2. Section 10 unequivocally requires that there be, as a prerequisite to review, a "final order." The Board's direction of election is not a "final order." *Cupples Company Manufacturers* v. *National Labor Relations Board*, 103 F. 2d 953, 955 (C. C. A. 8th). Compare *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board*, 97 F. 2d 1010 (C. C. A. 7th); *Ames Baldwin Wyoming Co.* v. *National Labor Relations Board*, 73 F. 2d 489, 490, 491 (C. C. A. 4th). It is not an order at

all, either in form or substance, but is a direction that, as part of the investigation concerning representation authorized by the Board, an election by secret ballot be conducted under the supervision of the Board's Regional Director.[2] Compare *Shannahan* v. *United States*, 303 U. S. 596; *United States* v. *Los Angeles R. R.*, 273 U. S. 299, 310. The direction does not purport to require respondent, or anyone other than the Board's Regional Director, to take or refrain from taking any action. By its use of terminology in the carefully drafted statute, particularly in Section 9 (d) where, alone in the statute the two types of proceedings are de-

[2] The Board's Second Direction of Election, insofar as pertinent, reads as follows (R. 24–25):

"By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended, it is hereby

"Directed that, as part of the investigation authorized by the Board to determine representatives for the purposes of collective bargaining with Consumers Power Company, Jackson, Michigan, an election by secret ballot shall be conducted within forty-five (45) days from the date of this Direction, under the direction and supervision of the Regional Director for the Seventh Region, acting in this matter as agent of the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among all the employees of the Company, * * * who were on the pay roll of the Company for the pay-roll period next preceding August 29, 1938, except those who have since quit or been discharged for cause, to determine whether or not they desire to be represented by Utility Workers Organizing Committee, for the purposes of collective bargaining."

scribed in the same section, Congress drew a clear distinction between "facts certified" and "certification" under Section 9, and an "order" issued and reviewable under Section 10.

If the Board's direction of election is regarded as an order within the meaning of the statute, which we think it is not, it is plainly interlocutory and not final, since no legal consequences stem from it. Not until after the election has been held can the Board determine or certify the name of the representative designated by a majority of the employees. Indeed, none may be certified at all. And even when, upon the basis of an election, the Board certifies a labor organization as the exclusive representative of the employees for the purpose of collective bargaining, the certification falls short of being a final order within the scope of Section 10 (f). *United Employees Association* v. *National Labor Relations Board*, 96 F. 2d 875 (C. C. A. 3d); *American Federation of Labor* v. *National Labor Relations Board*, 103 F. 2d 933 (App. D. C.), No. 70, this Term, pending argument herewith.[8] Cf. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 562; *Shannahan* v. *United States*, 303 U. S. 596; *Wallach's, Inc.* v. *Boland*, 277 N. Y. 345.

Even if, contrary to the decisions last cited, the circuit courts of appeals have jurisdiction to review

[8] This question will be discussed at greater length in our brief in the *American Federation of Labor* case.

a Board certification, although not the basis of any order against the employer in an unfair labor practice case which is under review, yet the instant suit must be dismissed as premature: whether there will ever be a certification in this case is still wholly speculative. The directed election is but a part of the continuing and as yet incomplete investigation, or gathering of evidence, on the question concerning representation. A secret ballot is but a method of ascertaining facts, as is a hearing. After the last election has been held the Board may certify the chosen representative, or, if none is chosen, dismiss the petition for investigation. Meanwhile, the Board's direction of election neither forbids nor compels any action on the part of respondents. In these circumstances, the holding of the court below that it had jurisdiction violates not only the intent of Congress expressed in Section 10 (f) but also the "traditional conceptions of federal judicial power." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130. Cf. *In re National Labor Relations Board*, 304 U. S. 486, 494, 495; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383–385; *Jones* v. *Securities & Exchange Commission*, 79 F. 2d 617, 619 (C. C. A. 2d), certiorari denied, 297 U. S. 705; *Chamber of Commerce* v. *Federal Trade Commission*, 280 Fed. 45, 48 (C. C. A. 8th).

3. It has been shown that Section 10 (b) applies only to the review of final orders entered in unfair

labor practice cases. We now show that Section 9 (d) was affirmatively intended by Congress to preclude a review of a direction of election, or indeed of any action in a representation investigation, except in the single instance there provided. Section 9 (d) provides:

> Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 9 (d) thus establishes a method whereby review of Board certifications may be had when an order made pursuant to Section 10 (c)—i. e., in a proceeding to prevent unfair labor practices—is based upon facts certified.[4] In thus making representation investigations reviewable in a single situation, and providing for such review in no other situation, Congress, as conclusively shown by the

[4] Such a case most frequently arises when an order to bargain collectively, pursuant to Section 8 (5), is based in part upon facts found in an investigation under Section 9 (c).

legislative history of the Act, intended that there should be no other such review.

The Senate Committee Report (S. Rept. No. 573, 74th Cong., 1st Sess., p. 14) declares, under the heading "ELECTIONS":

> Section 9 (c) empowers the National Labor Relations Board, whenever a question affecting commerce arises concerning the representation of employees, to conduct an investigation either by secret ballot or otherwise to determine such representatives. In any such investigation an appropriate hearing must be held.
>
> *Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing.* But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides

> a complete guarantee against arbitrary action by the Board. [Italics supplied.]

The House Committee Report (H. Rept. No. 1147, 74th Cong., 1st Sess., p. 23) similarly states:

> As previously stated in this report, the efficacy of Public Resolution 44 [a predecessor of the National Labor Relations Act—see *infra*, p. 27] has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9 (c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard.

The affirmative intent of Congress to preclude judicial review of a direction of election, in the absence of any order against the employer based thereon, further appears from the remarks of Senator Walsh, Chairman of the Senate Committee, in response to questions on the floor of the Senate (79 Cong. Rec. 7658), as follows:

> Mr. COUZENS. The Senator said that Resolution 44 was ineffective. Will he tell us

before he concludes why Resolution 44 was ineffective?

Mr. WALSH. It was ineffective, as I think I stated, because of appeals to the courts. In cases where attempts have been made to hold elections the claim has been made that the Board had no legal authority; the cases have been brought into court, and they are in the courts and undecided.

* * * * *

Mr. COUZENS. Would the passage of the pending bill *remove* the appeals to the courts?

Mr. WALSH. *Yes; it would because it limits appeals. It provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election.* [Italics supplied.]

The references to Public Resolution 44 (approved June 19, 1934, c. 677, 48 Stat. 1183), which, with Section 7 (a) of the National Industrial Recovery Act (Act of June 16, 1933, c. 90, 48 Stat. 195; 15 U. S. C., Sec. 707), was the immediate legislative predecessor of the National Labor Relations Act, indicate the reasons for the anxiety of Congress to limit the review of representation investigations to cases in which they were the bases for unfair labor practice orders. Under Section 2 of that Resolution, the old National Labor Relations Board was empowered to hold elections, but "any order" issued under that authority was re-

viewable in the circuit courts of appeals.[5] Cf. *Ames Baldwin Wyoming Co.* v. *National Labor Relations Board*, 73 F. 2d 489, 490 (C. C. A. 4th).[6] The manner in which this review operated in the single year of its life to nullify the election provisions is described at length in the reports of the committees recommending the passage of the National Labor Relations Act. The following passages from those reports, as well as those already quoted, permit of no doubt as to the design of Congress to remedy the weakness contained in the

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[5] Section 2 read as follows:

"Any board so established is hereby empowered, when it shall appear in the public interest, to order and conduct an election by a secret ballot of any of the employees of any employer, to determine by what person or persons or organization they desire to be represented in order to insure the right of employees to organize and to select their representatives for the purpose of collective bargaining as defined in section 7a of said Act and now incorporated herein.

"For the purposes of such election such a board shall have the authority to order the production of such pertinent documents or the appearance of such witnesses to give testimony under oath, as it may deem necessary to carry out the provisions of this resolution. Any order issued by such a board under the authority of this section may, upon application of such board or upon petition of the person or persons to whom such order is directed, be enforced or reviewed, as the case may be, in the same manner, so far as applicable, as is provided in the case of an order of the Federal Trade Commission under the Federal Trade Commission Act."

[6] In this case, the court held that the direction of election involved therein was not a reviewable order. Inasmuch as the direction did not specify the time or place or terms of the election, the court regarded it as a mere announcement of an election some time in the future.

Act's predecessor. The House Committee Report (H. Rept. 1147, 74th Cong., 1st Sess., pp. 6–7) states:

> Public Resolution 44 has not proved much more satisfactory even in its provisions which had some virtue over the preexisting law, namely, the provisions for elections. * * * Any order issued by the Board under the authority of this section may be enforced or reviewed, as the case may be, by petition in the appropriate circuit court of appeals, following the procedure of the Federal Trade Commission Act.
>
> The weakness of this procedure is that under the provision for review of election orders employers have a means of holding up the election for months by an application to the circuit court of appeals. [The report here discusses instances of delay of elections by applications for review.] * * *
>
> The election is but a preliminary determination of fact, and there is no reason why employers should have an opportunity for court review prior to the holding of the election. The ability of employers to block elections has been productive of a large measure of industrial strife. When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs

> the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review.

The Senate Committee Report (S. Rept. 573, 74th Cong., 1st Sess., pp. 5–6) states, under the heading "WEAKNESSES IN EXISTING LAW":

> *Obstacles to elections.*—Under Public Resolution 44, any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a company has chosen to contest an election order of the Board, has reached decision in any circuit court of appeals.
>
> This break-down of the law is breeding the very evil which the law was designed to prevent. During the past year and a half the country has lived under the constant shadow of actual or impending warfare in factory and in mine.

The position adopted by the court below would bring on the very consequences which Congress in the light of past experience deliberately sought

to avoid when it drafted the National Labor Relations Act.[1]

To avoid the result of this clearly manifested Congressional intention, and of the natural meaning of Section 9 (d) itself, respondents pointed out in their brief in opposition to the petition for certiorari (pp. 49–50) that Congress did not anticipate the present division in the ranks of organized labor, but had in mind only the need for precluding "vexatious and procrastinating" appeals by employers.

It is true that appeals by employers had focussed attention on the need for preventing the delays occasioned by resort to the courts, but the harm which Congress sought to avoid would be the same regardless of who might be responsible for the particular appeal. Moreover, it appears that Congress contemplated the possibility of rivalry between labor organizations and meant to preclude appeals by them as well as by employers. The House Committee Report (*supra*, p. 26), stated, at page 22, that questions of representation, under Section 9 (c), would "ordinarily arise as between two or more bona fide organizations competing to represent the employees". The Senate Committee Report (*supra*, p. 25) stated, as a justification for Section 9 (d), that "An election is the mere de-

[1] In the year covered by the Board's most recent annual report, the Board ordered elections in 258 cases. *Third Annual Report of the National Labor Relations Board*, p. 40.

termination of a preliminary fact, and in itself has no substantial effect upon the rights *of either employers or employees.*" (Italics supplied.) In any event, the Court cannot interpret Section 9 (d) differently according to who seeks the review. Whatever may have been the motives of Congress in precluding review of representation cases unless the facts therein became in whole or in part support for an order under Section 10, review was nevertheless precluded. If other considerations in the labor movement now indicate that Congress erred, it is for Congress to reconsider the subject, and if it concludes review should be provided for, to prescribe the manner and terms under which it may be had.

4. Respondents also contended in their brief in opposition (pp. 43–49) that the Act would violate the Fifth Amendment if the interpretations of Sections 10 (f) and 9 (d) urged by the Board were correct. The court below apparently thought this argument of some weight. See R. 47; 105 F. 2d, 588, 600. We submit, however, that it is wholly unsubstantial as to both sections.

In regard to Section 10 (f), there can be no possible question of constitutionality, since Congress plainly was not required to confer jurisdiction upon the circuit courts of appeals. *Shannahan* v. *United States*, 303 U. S. 596. And as was said in *In re National Labor Relations Board*, 304 U. S. 486, 495:

The investiture of a court with jurisdiction to review an order on the merits only upon the filing of a transcript exhibiting the Board's final action is not a denial of due process as suggested by counsel.

We think it scarcely less clear that Congress, by Section 9 (d), could exclude judicial review of the Board's direction of election. Respondents' argument to the contrary has not been so stated as to reveal its precise grounds. But, apparently, it is that the Board's direction of election deprives respondents of their alleged rights to an election and rights to self-organization or collective bargaining, and that the due-process clause requires judicial review of any administrative action which affects rights or privileges valued by the parties. However, neither of these propositions is correct. The Board's direction of election has no legal effect upon any rights of respondents. There is not even a statutory, much less a constitutional, right to an election. The Act merely authorizes the Board to investigate questions concerning the representation of employees, and states that in any such investigation the Board "may take a secret ballot of employees, or utilize any other suitable method" of ascertainment. (Section 9 (c)). This is far from granting a private right. It is merely a grant of investigatory and fact-finding power to the Board, and Congress could have withheld or could at will withdraw the power at any time without violating

any constitutional right of respondents. Cf. *Kline* v. *Burke Construction Company*, 260 U. S. 226, 234; *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 330.

While the statute grants to employees the right of self-organization and collective bargaining (Section 7), these rights are in no way infringed by a mere direction of election. The Board's direction of an election does not purport to prevent or curtail the exercise of either right. Nor does it impose any duty upon the employer to treat or not to treat with a particular representative. As said in *United States* v. *Los Angeles R. R.*, 273 U. S. 299, at 310, "It is the exercise solely of the function of investigation." Even if the U. W. O. C. were to win the election herein, and thereafter be certified as the representative of the employees, the proceeding would have had no such compulsory effect upon the rights of the respondents as would bring it within the scope of judicial review. *United Employees Ass'n* v. *National Labor Relations Board*, 96 F. 2d 875 (C. C. A. 3d); *American Federation of Labor* v. *National Labor Relations Board*, 103 F. 2d 933 (App. D. C.), No. 70, this Term, pending argument herewith. Cf. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 562; *Pennsylvania Railroad Co.* v. *Labor Board*, 261 U. S. 72; *Wallach's, Inc.* v. *Boland*, 277 N. Y. 345.

Finally, even if it were assumed that the Board's direction of election had any legal effect upon the rights of respondents, we think it very clear that

the Constitution would not require a review of it, for, as already shown (*supra*, pp. 20–33), the Board's direction is a mere interlocutory step in the proceeding. Thus it is the type of administrative action as to which judicial review is especially supererogatory for the reason that it "does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action." *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 130; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383–385; *Jones v. Securities & Exchange Commission*, 79 F. 2d 617, 619 (C. C. A. 2d), certiorari denied, 297 U. S. 705; *Chamber of Commerce* v. *Federal Trade Commission*, 280 Fed. 45, 48 (C. C. A. 8th). An election, like a hearing, is merely a method of gaining facts, and there is no more constitutional necessity for a review of a direction of an election in a representation case than for a review of a notice of a hearing in an unfair labor practice case. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Even in cases, unlike the present, involving some final action of an administrative body, it has long been established that there is not, generally speaking, any constitutional right to judicial review. Numerous cases so holding or tacitly so assuming are collected in the concurring opinion in *St. Joseph Stockyards Company* v. *United States*, 298 U. S. 38, 77–81, and in *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125. See also *Federal Radio Commission* v. *Gen-*

eral Electric Co., 281 U. S. 464, 469; *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 275; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, 700–701; *Ex parte Bakelite Corp'n*, 279 U. S. 438.

II

THE BOARD DID NOT ABUSE ITS DISCRETION IN DIRECTING THAT THE NAME OF THE RESPONDENT LOCAL BE OMITTED FROM THE BALLOT IN THE RUN-OFF ELECTION

Respondents' contention on the merits in that the Board acted in excess of its authority under Section 9 (c) in directing that the run-off election be conducted without the inclusion of respondent's name on the ballots to be used. This contention was upheld by the court below, and the decision of that court setting aside the Board's direction of election apparently requires that, if any second election is held, the names of both competing labor organizations must be on the ballot. While we think that the court below was without jurisdiction to pass on the direction of election (*supra*, pp. 14–35), and therefore should have granted the Board's motion to dismiss, upon which the case was heard (R. 48; 105 F. 2d 598, 601), we submit that if the court had jurisdiction its decision on the merits is erroneous.

The practice of the Board in cases in which in the first election two organizations appeared on the ballot, along with a place for the "neither" vote,

and in which none of the three received a majority of the votes cast, has been to hold a run-off election, if requested by the union receiving a plurality, in which the employees may vote for or against representation by the organization obtaining a plurality. It is this practice which is now challenged. Its validity, we think, is plain, in the light of the reasons for its adoption and of its operation to date.

Section 9 (a) of the Act provides that the representative designated by a majority of the employees in an appropriate unit shall be the exclusive representative of all the employees in the unit for purposes of collective bargaining. Section 8 (5) imposes a duty upon the employer to bargain collectively with such a representative, and, when there is such a representative, it also imposes a "negative duty" not to bargain with any other. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44–45. In the absence of such a representative, however, the statute does not require the employer to bargain collectively. Therefore, if a majority of the employees cannot agree upon a representative, or do not wish to be represented at all, the ballots used should enable them to say so. In such a case the Board would dismiss the petition for certification.

Accordingly, the Board, in its conduct of elections, utilizes ballots which are designed to preclude the possibility of certification of a representative

which, in fact, represents only a minority of the employees. In cases where there is only one union claiming to represent the employees, the ballot always allows the employees to vote either for or against the union. In cases, such as the instant, where there are two labor organizations, each claiming to represent the employees, the Board in the first election places the names of both organizations on the ballot, and, in addition, provides a place for the employees to vote for "neither."[8] If a provision were not made for a "neither" vote, it might result, if there were employees who did not desire to be represented at all, that a representative of only a minority of the employees would be certified as the exclusive representative, since the employees who did not desire to be represented would be compelled to vote, if they voted at all, for one or the other of the unions on the ballot. The election would be decisive, whether or not they voted, inasmuch as the votes of a majority of the employees voting would control the result. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 560–561; *Nashville, C. & St. L. Ry.* v. *Railway Employees Dep't of A. F. of L.*, 93 F. 2d 340, 343 (C. C. A. 6th), certiorari denied, 303 U. S. 649.

[8] If there are more than two competing unions, the Board places the name of each on the ballot, and, in addition, provides a place for a vote for none. *In the Matter of Aluminum Company of America*, 12 N. L. R. B., No. 34; 13 N. L. R. B., Nos. 11, 11b; 15 N. L. R. B., No. 42.

The Board's care to give all eligible employees, nonunion as well as union, opportunity to express themselves fully, is explained in its decision in *In the Matter of Interlake Iron Corporation*, 4 N. L. R. B. 55, 61, as follows:

> The Act, however, does not require an unwilling majority of employees to bargain through representatives. It merely guarantees and protects that right of a majority if it chooses to exercise it. Yet if the opportunity of voting against the organizations named on the ballot were denied, a majority might be forced against its will to accept representation by one or other of the nominees. The policy adopted by the Board is designed merely to make sure that the votes recorded for a particular representative express a free choice rather than a choice in default of the possibility of expressing disapproval of both or all proposed representatives.

In accordance with the Board's practice since the *Interlake* case, the ballot in the first election in the present case permitted the employees to register a vote for the I. B. E. W. or for the U. W. O. C., or for neither (R. 36). No question has been raised as to the propriety of the form of this ballot. The result of the election was, however, inconclusive. Out of a total of 2,977 employees eligible to vote, 1,164 voted for the U. W. O. C., 1,072 voted for the I. B. E. W., and 506 voted for neither (R. 15). Thus, although a majority of the employees in-

cated their desire to be represented for purposes of collective bargaining, at least if they could be represented by the particular organization of their choice, a majority did not agree upon either the I. B. E. W. or the U. W. O. C. as their representative. In such a situation, as has been stated, the Board's established practice was to hold a run-off election upon the request of the union which received a plurality of the votes in the first election, in which the ballot would provide for a vote for or against that union only. This practice, which had been followed in numerous cases prior to the instant one (footnotes 10 and 11, *infra*, p. 45), was first announced in the *Interlake Iron* case, *supra* (4 N. L. R. B. at 62).

When the U. W. O. C. requested the Board to direct a run-off election to determine whether or not the employees desired to be represented by the U. W. O. C. (R. 16), the Board, upon reconsideration of its prior practice in the light of the oral argument in this case (R. 16–17), issued its decision granting the request (R. 14–18).

In thus adhering to its established practice the Board clearly did not abuse the discretion conferred upon it by Section 9 (c). The Board was presented with the following alternatives: (1) to dismiss the petition without directing any further election; (2) to direct a run-off election in which both the U. W. O. C. and the I. B. E. W. would be on the ballot, but in which "neither" would be omitted from the ballot; (3) to direct a run-off

election in which the employees could vote for or against the U. W. O. C.; (4) to direct a run-off election in which the employees could vote for or against the I. B. E. W.; (5) to direct (3) with the understanding that (4) would be directed in the event that (3) should prove indecisive; (6) to direct some other method of ascertaining by what organization, if any, a majority of the employees desired to be represented. We may eliminate (4) as being clearly inconsistent with the results of the first election.

As regards the remaining alternatives, the Board has deemed (1) to be objectionable in that it would foreclose the possibility that a majority of the employees might willingly agree upon a representative notwithstanding that in the first election a large majority signified a desire for collective bargaining by voting for one or the other of the unions (see R. 15). With respect to (5), we submit that such a procedure, although undoubtedly it would be within the power of the Board to adopt, might well be considered objectionable on the grounds, among others, (a) that two run-off elections would probably be required, since those who preferred the I. B. E. W. in the original election would probably vote against the U. W. O. C. in the first run-off in the hope of assuring thereby the holding of the second run-off; and (b), that if such proved to be the case, the result would be that the employees who voted for the U. W. O. C. in the original election would be the ones invited to change their votes

in order to secure collective bargaining, notwithstanding that they constituted the plurality in the original election.

We turn, then, to (2) and (3). Respondents contend, and the court below seems to have held, that (2) is the course which the Board should have followed. We submit, however, that the Board's action in following (3), in accordance with its settled practice was entirely reasonable and within its discretion.

The view of the court below to the contrary was based upon an erroneous construction of Section 9 (a) of the Act and upon a misconception of the purpose of an investigation proceeding under Section 9 (c). These misapprehensions were concretely embodied in its opinion as follows (R. 46; 105 F. 2d, at 600):

> The purpose of the election was to select, not to reject, representatives.

For reasons already indicated (*supra*, pp. 37–39), we think that this interpretation is incorrect. The purpose of an election pursuant to Section 9 (c) is not to compel the selection of a representative, but to enable the Board to ascertain whether there is one. If a majority of the total employees eligible to vote are in fact not agreed upon a representative, the ballot used by the Board should enable the Board to ascertain whether such is the case, for otherwise, contrary to the intent of Section 9 (a) and (c), a union which represents only a minority of the employees might be certified. The problem

of how to avoid such a result in the case of a run-off election is no different, in substance, than the question whether a place for a "neither" vote should be included on the original ballot, which was decided in the *Interlake* case (*supra*, pp. 38–39).

In considering in greater detail the objections to a run-off election in which both the I. B. E. W. and the U. W. O. C. would again be on the ballot, but in which "neither" would be eliminated, we may reasonably assume that the employees who voted for the unions in the original election would vote again for the most part as they did before. Consequently, in order for the I. B. E. W. on such a ballot to secure a majority vote, the probabilities are that the plurality of 92 votes in favor of the U. W. O. C. in the original election could be overcome only by votes drawn from the 506 employees who voted for "neither" in the original election. But since, unlike the situation in the original election, the latter would be afforded no opportunity to vote against representation by the unions, their votes in such a run-off election could not be regarded as genuinely expressive of a desire to be represented by the union for which they voted, but could only be regarded as votes against the rival union, except in the instances in which some of them might have changed their minds since the original election. Thus, as in the case of an original election in which the ballot would exclude a vote for "neither," the Board could not be sure that a majority of the employees were in fact agreed upon collective bar-

gaining through the union winning the election. This is the first objection to the run-on election advocated by respondents. A second objection is that the nonunion employees would be required, if they voted at all, to vote as between unions, neither of which they wanted. We think that this would be a dilemma far more acute than the "parallel of Hobsons' choice" to which the court likened the Board's ballot; R. 46; 105 F. 2d, at 600.

No such doubt or comparable dilemma could arise from the form of ballot directed by the Board. The nonunion employees, under the practice followed by the Board, are enabled to vote against the U. W. O. C., as may also those employees who wish to adhere to their original votes for the I. B. E. W.; but the Board's ballot leaves it open to the latter to subordinate their preference as between representatives to their already indicated desire for collective bargaining. Thus there is no compulsion upon any employee to choose between bargaining representatives, neither of which he wants, or, if he does not vote at all, to be bound, nevertheless, by the vote of the majority of those voting.

The willingness of some employees to subordinate their preference as between unions to their fundamental desire for collective bargaining is borne out by the experience of the Board in similar

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The reference of the court below to the U. W. O. C. as the "nominee of the Board" was clearly unjustified. R. 46; 105 F. 2d, at 600. As already shown, the U. W. O. C. is to be on the Board's ballot for the reason that it received a plurality of the votes in the original election.

run-off elections hitherto held in other cases. In six of the thirteen such elections which have been held in cases now closed, the union which was on the ballot in the run-off election failed to receive a majority of the votes.[10] In the remaining seven cases the union which was on the ballot won the election.[11] While these results would seem to support the practice of holding a run-off election, they rebut the claim of respondents that the form of ballot directed by the Board in the instant case has predetermined the result of the election in favor of the U. W. O. C.

It may be noted that run-off elections conducted in accordance with the method here chal-

[10] *In the Matter of J. C. Little & Ives Co.*, 7 N. L. R. B. 12; *In the Matter of Shell Oil Co.*, 9 N. L. R. B. 908, 10 N. L. R. B. 1370; *In the Matter of Tidewater Associated Oil*, 9 N. L. R. B. 821; *In the Matter of Utah Copper Co.*, 9 N. L. R. B. 775; *In the Matter of Aluminum Line et al.*, 10 N. L. R. B. 672; *In the Matter of Bemis Bros. Bag Co.*, 11 N. L. R. B. 1058.

[11] *In the Matter of Folders Mfg. Co.*, 5 N. L. R. B. 260; *In the Matter of Whitaker Paper Co.*, 7 N. L. R. B. 305; *In the Matter of Elliott Bay Lumber Co.*, 9 N. L. R. B. —; *In the Matter of Unit Cast Corp.*, 8 N. L. R. B. 831; *In the Matter of Shell Petroleum Corp.*, 11 N. L. R. B. 572; *In the Matter of Milwaukee Publishing Co.*, 12 N. L. R. B., No. 7; *In the Matter of Kingan & Co.*, 14 N. L. R. B., No. 54. A similar result was reached in *In the Matter of Aluminum Co. of America*, 15 N. L. R. B., No. 42, following a series of run-off elections involving three competing labor organizations. (See 12 N. L. R. B., No. 34; 13 N. L. R. B., No. 11; 13 N. L. R. B., No. 11 (b).)

lenged have been requested of the Board by unions affiliated with both of the two major labor organizations of the country. Six of the thirteen run-off elections which have been held were held at the request of unions affiliated with the American Federation of Labor, with which respondents are affiliated.[12] In the seven other cases the requests were made by unions affiliated with the Congress of Industrial Organizations, or its predecessor, the Committee for Industrial Organizations.[13]

In view of the foregoing considerations, we submit that the court below clearly erred in holding that the Board's direction in this case was illegal and unfair. Section 9 (c) obviously gives the Board wide discretion as to the manner in which it may conduct an investigation to ascertain rep-

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[12] *In the Matter of J. J. Little & Ives Co.; In the Matter of Unit Cast Corp.; In the Matter of Tidewater Associated Oil; In the Matter of Shell Oil Co.; In the Matter of Milwaukee Publishing Co.; In the Matter of Kingan & Co., Inc.; supra*, footnotes 10 and 11.

[13] In the *Aluminum* case (*supra*, footnote 11), the first request for a run-off election was filed by an independent association (12 N. L. R. B., No. 34). In the second run-off election the Association received a smaller number of votes than the remaining union on the ballot (13 N. L. R. B., No. 11 (b)), and the Board, accordingly, directed a final run-off election, in which its name would be omitted from the ballot. The Association applied to the court below for a stay of the Board's direction. The application was denied by the court without opinion. *Aluminum Employees Association v. National Labor Relations Board*, decided August 30, 1939 (not reported).

resentatives. Cf. *Pennsylvania Railroad Co.* v. *Labor Board*, 261 U. S. 72, 83, 85; *Nashville, C. & St. L. Ry.* v. *Railway Employees Dept. of A. F. of L.*, 93 F. 2d 340, 342 (C. C. A. 6th), certiorari denied, 303 U. S. 649; *Association of C. E. of A., T. & S. F. Ry. System* v. *Brotherhood of Ry. & S. S. Clerks*, 85 F. 2d 152, 157 (C. C. A. 7th). And when the form of ballot directed by the Board is analyzed in the light of the provisions of Section 9 (a) and (c), and of actual experience, it may not be said that the Board abused its discretion. Perhaps the Board, in the light of further experience, may decide to adopt a different form of ballot ((6), *supra*, p. 41), or, indeed, may conclude that run-off elections should not be held at all. The Board's judgment and experience thus far, however, have persuaded it that run-off elections and the form of ballot used in the present case properly aid in carrying out the policies of the Act. That conclusion is based upon reasonable grounds.

CONCLUSION

It is submitted that the court below was without jurisdiction and that, therefore, this Court should reverse the decision and remand the case with direction to dismiss the petition for review. In the event that the court below is held to have had jurisdiction, the Court should reverse the decision and

sustain the Supplemental Decision and Second Direction of Election issued by the Board.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

THOMAS HARRIS,
Attorney.

CHARLES FAHY,
General Counsel,
ROBERT B. WATTS,
Associate General Counsel,
LAURENCE A. KNAPP,
Assistant General Counsel,
H. G. INGRAHAM,
Attorney,
National Labor Relations Board.

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APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Supp. IV, Sec. 158 *et seq.*) are as follows:

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, main-

tained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain [1] such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c), is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be

[1] So in original.

established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board

shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file

in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive.

and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems

just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101–115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.